IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2041 OF 2005

IN

SUMMARY SUIT NO.574 OF 2004

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Rasiklal Manikchand Dhariwal
and ors. ...Plaintiffs

v/s.

Kishore Washwani and another ...Defendants

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Mr.Ravi Kadam Advocate General with Mr.V.R.Dhond, Mr.Vicky Singh i/b Mulla & Mulla & CB & Co. for the Plaintiffs.

Dr.V.V.Tulzapurkar with Mr.Sandip Parekh and Mr.H.I.Engineer i/b Gordhandas & Fozdar for Defendant

No.1.

Mr.Iqbal Chagal with Mr.Janak Dwarkadas, Mr.D.D. Madon, Mr.Vinod Bhagat with Mr.Sanjeev Sachdeva and Mr.Vivek Gautam i/b G.S.Hegde & V.A.Bhagat for Defendant No.2.

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CORAM: D.K.DESHMUKH, J.

DATED: 15TH DECEMBER,2006

P.C.:

1. This Notice of Motion has been taken out by the Defendant No.2 for stay of trial of the present suit till the final disposal of the suit pending before the District Judge, Mandaleshwar in the State of Madhya Pradesh being Suit No.8A of 2004.

2. According to Defendant No.2, the Plaintiffs have filed this suit for permanent injunction amongst other reliefs based on their alleged trade-mark "MANIKCHAND". The present suit was filed on 9-2-2004 by the Plaintiff for a permanent injunction

restraining the Defendants from passing off or attempting to passing off by selling or attempting to sell etc. their goods i.e. Supari Mix under the trade-mark "MALIKCHAND" or any trade-mark deceptively similar to their trade mark "Manikchand". That suit was instituted only against the present Defendant No.1 Kishor Wadhwani. According to the Plaintiffs, the Plaintiffs adopted the trade-mark "Malikchand" in respect of goods including Tea, Packaged Drinking Water, Electric Switches, Mouth Refreshing and Tobacco preparations since 1961.

3. According to the Plaintiffs their trade-mark Manikchand has acquired valuable reputation and goodwill in the market. According to the Plaintiffs, the Defendants deliberately and with malafide intention had dishonestly adopted the word mark "Malikchand" with a view to pass off their goods as that of the Plaintiffs. Thus, the present suit is passing off action initially brought only against the Defendant No.1. It appears that, thereafter, an application was made in this suit for amendment in the plaint. One of the amendment sought was adding of the present Defendant No.2 as a party to the suit. That amendment was granted by the court on 2-2-2005.

It appears that the Defendant No.2 had filed the suit in the court at Mandleshwar, in the State of Madhya Pradesh on 15-3-2004 claiming that the present Plaintiffs are trying to pass of their goods under their mark "Manikchand" which is deceptively similar to the trade-mark of the Defendant No.2 i.e. Malikchand. Defendant No.2 in that suit apart from other reliefs has claimed a permanent injunction restraining the present Plaintiffs from selling their goods under the trade-mark "Manikchand" because according to the Defendant No.2 it is deceptively similar to their trade-mark "Malikchand". In that suit the present Plaintiffs made an application under Section 10 of the Civil Procedure Code claiming that the present suit is a previously instituted suit and therefore trial of the suit filed in Madhya Pradesh should be stayed till the present suit is decided. That application was decided by the court at Mandleshwar after hearing both sides by order dated 3-2-2006. The application was rejected. It was held that so far as the present Defendant No.2 who is Plaintiff in that suit is concerned, present suit was instituted after the suit was instituted in the court at Mandleshwar. The order passed by the Mandleshwar court was challenged by the present Plaintiffs by

filing Writ Petition No.979 of 2006 before the Madhya Pradesh High Court and the High Court rejected that Writ Petition by order dated 19th April, 2006.

4. In this suit this application has been taken out by the Defendant No.2 under Section 10 of the CPC claiming that the matter in issue in this suit and the suit pending in the Mandleshwar court is substantially the same. The suit in Mandleshwar Court was previously instituted and both the suit are between the same parties and therefore, the trial of this suit should be stayed by making an order under Section 10 of the Civil Procedure Code because this is a subsequently instituted suit.

5. The Plaintiffs have not filed any reply to the affidavit filed in support of this motion by the Defendant No.2. The learned Counsel appearing for the Defendant No.2 submits that the Mandleshwar Court has recorded a clear finding that the suit pending in the Mandleshwar court is a previously instituted suit between the Plaintiffs and the Defendant No.2 in this suit. That finding recorded by the Mandleshwar court has not been set aside by the High Court in a petition where that finding was challenged and

therefore between the Plaintiffs and the Defendant No.2 that finding operates to estop the present Plaintiffs from making any contrary claim. The learned Counsel submits that in the application filed in the Mandleshwar court the present Plaintiffs themselves have stated that the matter in issue in both the suits is substantially the same. He has also claimed that the parties to both the suits are the same. According to the learned counsel, therefore, the trial of this suit has to be stayed by exercise of powers under Section 10 of the Civil Procedure Code. The learned Counsel for the Defendant No.2 also relies on a judgment of the Supreme Court in the case of Ramalingam Chettiar v/s. P.K.Pattabiraman & another, (2001) 4 SCC 96 **to claim that in view of the provisions of Section 21 of the Limitation Act when a party is added to the suit by amending the plaint, the institution of the suit in so far as that party is concerned is on the date on which the order adding that party is made. The learned Counsel further submits that sub-rule 5 of Rule 10 of Order 1 of the Civil Procedure Code lays down that the proceedings against any person added as a Defendant shall be deemed to have begun only on the service of the summons on that party.** Therefore,

according to the learned Counsel in so far as the Defendant No.2 is concerned, this suit is a suit instituted subsequent to the institution of the Mandleshwar suit.

6. The learned Counsel appearing for the Defendant No.2, on the other hand, submits that the perusal of the order of the High Court in Writ Petition No.979 of 2006 shows that all the issues on which the application under Section 10 was decided have been kept open by the High Court and therefore, the finding recorded by Mandleshwar court does not estop the Plaintiffs from claiming in this suit that so far as the Defendant No.2 is concerned, this suit was instituted on the date on which the suit was filed with only Defendant No.1 as a Defendant i.e. in February, 2004. The learned Counsel further submits that one of the requirements of Section 10 of the CPC is that the court where the previously instituted suit is pending must have the jurisdiction to grant the reliefs claimed in that suit. In the submission of the learned counsel, therefore, it was necessary for the Defendant No.2 to claim in the affidavit filed in support of the motion that the Mandleshwar court has the jurisdiction to grant reliefs claimed

in that suit. According to the learned Counsel as there is no such averment to be found in the affidavit, the application made by the Defendant No.2 is liable to be rejected.

7. The present notice of motion has been taken out under Section 10 of the Civil Procedure Code. Section 10 of the CPC reads as under:-

> 10.Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in (India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of (India) established or continued by (the Central Government and having like jurisdiction, or before the Supreme Court.

8. Any party who seeks an order of stay of trial of the suit under Section 10 has to establish following

things:

(i) the matter directly and substantially in issue in both the suits is the same. (ii) both the suits are between the same parties or between the parties under whom they claim and (iii) both the courts are the court of like jurisdiction.

Perusal of the application filed by the present Plaintiffs in the Mandleshwar court shows in paragraph 8 the present Plaintiffs state thus:

> 8. It is submitted that since:
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> (i) The matter in issue in both the suits (suit no.574 of 2004 before Bombay High Court and the present suit) is substantially the same.
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> (ii) Suit No.574 of 2004 filed by the applicant-defendants was previously instituted.
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> (iii) Both the suits are between the same parties- MSS Food Products on one side and

Dhariwal on the other and for the parties are litigation in both the suit are the same a parties.

9. It is clear from paragraph 8 quoted above that according to the Plaintiffs themselves the matter in issue in both the suits is substantially the same. That both the suits are between the same parties. It is clear that even the Defendant No.2 did not dispute that the matter in issue in both the suits is the same and that parties to both the suits are also the same. The only dispute raised by the parties was whether the Mandleshwar Court's suit can be said to be previously instituted suit so far as Defendant No.2 is concerned. It is an admitted position that the amendment in the plaint by which the Defendant No.2 was added as a party to the present suit was granted on 2-2-2005. The question, for the purpose of Section 10, which date should be taken as the date of institution of the suit against the Defendant No.2 was raised in the chamber summons. But it is clear from the order passed by the Appeal court in Appeal No.158 of 2005 dated 3rd May, 2005 that that question was left open to be decided by the court, which will

decide the application under Section 10. The question as to whether the Mandleshwar suit is previously instituted suit or not was raised before the Mandleshwar suit. The decision is to be found in paragraphs 19 & 20 of the order passed by the Mandleshwar court. It reads as under:-

> 19. Thus from the perusal of order dated 2-2-2005 of Hon'ble Bombay High Court it is clear that in the present case Neetesh Wadhwani, the Petitioner, has been made a party to the case No.574/04 before the Hon'ble Bombay high Court as Respondent No.2 with effect from 2-2-2005 whereas Neetesh Wadhwani has filed the present case on 15-3-2004. Thus, the case filed by Neetesh Wadhwani, present case No.4A/04 dated 15-3-2004 has been filed earlier than the case before Hon'ble Bombay High Court bearing No.574/04 in which he has been made party with effect from 2-2-2005 and the case of the Petitioner has been filed prior to the case before Hon'ble Bombay High Court.
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> 20. In these circumstances the present

> petition No.4-a/04, its proceedings cannot be stayed till the disposal of the case No.574/04 before Hon'ble Bombay High Court. The judicial citation presented by the respondents are different from the facts of the present case and as such the same are not applicable in the present case and no benefit of these citations accrues in favour of the respondents. Against this the judicial citations filed on behalf of the petitioner support the reply of the petition. Keeping in view all these circumstances the application dated 7-2-2005, I.A. No.25 u/s 10 C.P.C. filed on behalf of the respondents is not worth consideration. Therefore, the same is dismissed.

10. It is clear from the above quoted paragraphs 19 & 20 that the Mandleshwar court has recorded a clear finding that in so far as present Defendant No.2 is concerned, the present suit was instituted on the date on which the amendment by which he was added as Defendant No.2 was granted by the court and therefore Mandleshwar suit becomes previously instituted suit. Even otherwise, even if the provisions of Section 21

of the Limitation Act are not taken into consideration because the issue whether addition of Defendant No.2 as a party is barred by the law of limitation does not arise, then also in view of the provisions of sub-rule 5 of Rule 10 of Order I of CPC, in my opinion, there is no doubt that it cannot be said that as against the present Defendant No.2 suit was instituted on the date on which the present civil suit was instituted with only present Defendant No.1 as the Defendant. The date of the institution of the suit as against the present Defendant No.2, if one goes by the provisions of Section 21 of the Limitation Act has to be the date on which the court granted amendment in the plaint, or a date even subsequent to that if one goes by the provisions of Sub-Rule (5) of Rule 10 Order I. I have not been pointed out any provisions of law saying that when a party is added as a Defendant in a suit, the addition of that party relates back to the date of institution of the suit, though on that date that party was not joined as a Defendant to that suit. In my opinion, therefore, even independently of the finding recorded by the Mandleshwar court, it is clear that so far as the present Defendant No.2 is concerned, this suit is instituted after the suit was instituted by the

Defendant No.2 in the Mandleshwar court.

11. So far as the question whether the Defendant No.2 was under an obligation to make an averments in the present application that the Mandleshwar court has the jurisdiction to grant the reliefs which are claimed by him in the suit filed by him in the Mandleshwar court is concerned, in my opinion, even if it is assumed that such a requirement exists, perusal of the affidavit filed in support of the motion and the documents that are filed along with that affidavit clearly establish that the Defendant No.2 has complied with that requirement. In paragraph (4) of the affidavit he has referred to the civil suit instituted by him in the Mandleshwar court and he has annexed a copy of the plaint. Perusal of the copy of the plaint annexed to the affidavit filed in support of the motion shows that the Plaintiff in that suit has clearly stated that the court has the jurisdiction to entertain that suit, because the product of the present Plaintiff is sold within the jurisdiction of that court.

12. As observed above, the present Plaintiffs have chosen not to file any affidavit in reply and

therefore so far as the present motion is concerned, the case of the Plaintiffs that the Mandleshwar court has jurisdiction to grant reliefs claimed in that suit remains undisputed. In any case the statement made by the Defendant No.2 in his plaint on which he is relying in support of this Notice of Motion has not been disputed by the present Plaintiffs by filing the reply in this Notice of Motion. Therefore, in so far as the present motion is concerned, I will have to accept at face value the statement made by the Defendant No.2 that the Mandleshwar court has the jurisdiction to grant relief claimed in the suit at Mandleshwar. Thus, even the requirement of the court where previously instituted suit is pending having jurisdiction to grant relief claimed in that suit is satisfied in the present case. I, therefore, find that out of four essential ingredients of Section 10 of CPC, two are admitted to exist by the Plaintiffs themselves and I also find that other two ingredients namely Mandleshwar suit being previously instituted suit and Mandleshwar court having jurisdiction to grant relief claimed in that suit are also satisfied and therefore the Defendant No.2 is entitled to have this Notice of Motion granted in his favour. Notice of Motion is, therefore, granted in terms of prayer

clause (a). Plaintiffs are directed to pay costs of this motion to the Defendants as incurred by the Defendants.

. At this stage a request is made for stay of operation of this order.

. Admitted position is that in this suit even issues have not been framed, therefore there is no question of commencement of trial of this suit in near future and therefore the application for stay is unnecessary. The request is, therefore, rejected.

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